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No. 907

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

YOUNG-PETERSON CONSTRUCTION, INC.,
an Illinois corporation,

Petitioner,

vs.

THE POTOMAC INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN P. MADIGAN,
Attorney for Petitioner.

JOHN A. COOK,
SAMUEL M. LANOFF,
MORGAN, HALLIGAN, LANOFF & COOK,
33 South Clark Street,
Chicago, Illinois 60603,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Young-Peterson Construction, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on July 18, 1967.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed as Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on the opinion on July 18, 1967, and the Petition for Rehear-

ing was denied on August 28, 1967. On November 27, 1967, an order was entered by this court extending the time for filing a Petition for Writ of Certiorari to December 13, 1967. Jurisdiction of this court rests on 28 U.S.C., sec. 1254.

QUESTION PRESENTED.

The question presented on this petition is whether the trial court was required to follow the Illinois Insurance Code in a suit involving an Illinois corporation on a policy issued in Illinois for a theft loss, which occurred in Illinois. The code provision barred a policy defense based on false representation unless the representation was in writing. The trial court and Court of Appeals permitted the defense even though the representation, if any, was entirely oral.

STATUTES INVOLVED

Section 1652 of the Judicial Code of the United States provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply." (28 U.S.C. sec. 1652).

Section 766 of the Illinois Insurance Code provides:

> "No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty, or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefore, of which a copy is attached to or endorsed on the policy, and made a part thereof.

No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. This section shall not apply to marine or transportation insurance. 1937, June 29, Laws, 1937, p. 696, sec. 154." (Ill. Rev. Stat., (1959), Chap. 73, Sec. 766).

STATEMENT OF THE CASE

This case concerns a suit by an insured for a theft, loss of vehicles valued at $68,000.00. The insurance was covered by a written binder delivered by the general agent to the company and the loss occurred during the binder period. Federal jurisdiction was based on diversity of citizenship.

This Petition for Certiorari is concerned with the action of the court in permitting a defense not permitted by Illinois law. The defense was that the claim of the insured was barred because of false representations made by the insured in the application for insurance. The application was verbal and there was no written representation by the insured. The Illinois Insurance Code bars defenses based on false representation unless the representation is written.

The defense of misrepresentation was asserted by the insurance company for the first time in an amended pleading filed on the first day of trial. This comprised the third affirmative defense as follows:

THIRD AFFIRMATIVE DEFENSE.

"1) Prior to the verbal agreement of the defendant's agent to bind comprehensive fire and theft coverage, Young-Peterson knew that certificates of title to the tractors and trailers, without disclosure of any liens

thereon, had been endorsed and delivered, along with the keys to the tractor-trailers, by the President of Young-Peterson to Robert Holtman.

2) That when making application for comprehensive fire and theft coverage, Young-Peterson knew of and withheld and failed to disclose said facts to defendant's agent.

3) The said withheld facts materially affected the acceptance of the risk or the hazard assumed by the defendant, and the withholding and failure to disclose said facts was with actual intent to deceive the defendant, and consequently, any coverage which the defendant's agent verbally agreed to was void." (App. 29. References are to the pages of the Appendix filed in the Court of Appeals and transmitted to this court as part of the record.)

Allen Young, the non-shareholding president of the plaintiff-corporation, had delivered the title papers to Holtman as part of his fraud against the corporation and these acts caused the loss. The applicant for the binder, Jay Mullen, a principal shareholder and vice-president, was unaware of this wrongdoing. There was no evidence of any written representation by the corporation as to these facts.

There was evidence that the titles and keys were in possession of a Robert Holtman, a creditor of Young, who took the vehicles in Illinois six weeks after he had obtained possession of the title and keys from Young in Illinois. Holtman then removed the vehicles to Phoenix, Arizona, where he sold them for $55,000.00.

The opinion of the Court of Appeals was devoted to consideration of the question of the nature of the "claim of right" defense and whether the jury had sufficient evidence to support a verdict that the taking by Holtman was in the exercise of a good faith claim of right. That issue is not germane to the question of whether the writ of certiorari should issue.

Mr. David Peck, a vice-president of defendant's general agent, Lamb, Little & Co., had issued a written binder. This had been denied by the defendant but the binder was produced from defendant's records during the course of the trial and an oral admission of coverage was then made by defendant's counsel. (App. 208). The trial judge permitted a line of questioning, over objection, to David Peck, which brought into evidence Mr. Peck's opinion that he would not have bound the company if he had known that the keys and titles were in the possession of Holtman, unless he had discussed this fact with the company. The testimony on this point is set out in Appendix C.

At the close of all of the evidence, the defendant asked for an instruction in the language of its third affirmative defense. (App. 280-1). There was an extended objection that this defense was directly contrary to the Illinois Insurance Code. See Appendix D. This objection was overruled. A part of the colloquy between court and counsel is as follows:

> "[Mr. Cook] Now, I would like to read, if I may—now, this is the insurance code. I would like to hand it up to the court, if the court please—
>
> The Court: No, I would rather not see it because I have said again and again the laws of Illinois are not to be brought in to aid either side in this.
>
> Mr. Cook: This eliminates the third affirmative defense. [The defense of misrepresentation].
>
> The Court: This defense number 3 I drafted was totally without concern for the insurance law of Illinois.
>
> Mr. Cook: But it has to be related to their affirmative defense.
>
> The Court: It is simply an old equitable defense that grows out of the law of contracts, fraud in the incep-

tion. It will void any contract. Any law of Illinois notwithstanding, it will always void a contract. If there was, I don't see where there is too much room for them to argue it, that there was.

Mr. Cook: I think it is grossly unfair to this plaintiff—

The Court: But there has been some evidence of fraud. There is some testimony from a witness whom you produced to the effect that had he known certain things, if they could have known by the insurer and transmitted to him, he would not have written the binder." (App. 252; Appendix D).

The court submitted the issue to the jury as to the third affirmative defense as follows:

"The defendant also has the burden of proving, as a third defense that the insurance contract was void by reason of fraud, in that at the time the insurance contract was made, the plaintiff insured knowingly concealed from the defendant insurer, facts, which, had they been known to the defendant insurer, would have caused the defendant not to have entered into the contract.

"If you find from your consideration of all of the evidence that each of the propositions required of the plaintiff has been proved and that none of the defendant's defenses has been proved, then your verdict should be for the plaintiff.

"If, on the other hand, you find from your consideration of all of the evidence that any of the propositions the plaintiff is required to prove have not been proved or that any of the defendant's defenses have been proved, then your verdict should be for the defendant." (App. 258-9).

The error of the trial judge in permitting this defense in view of the mandatory requirement of the Insurance Code was argued fully in plaintiff's opening brief in the Court of Appeals (entire point IV). The Petition for Rehearing was devoted to that point alone.

The judgment of the Court of Appeals against the plaintiff was based on an opinion which dismissed this point, among others, by simply stating, at the close, that "We have considered all of these contentions and find them lacking in merit . . .". (Op. p. 6).

ARGUMENT

The question on this petition is whether the refusal of the trial judge and the Court of Appeals to apply Illinois statute law is of such serious moment as to require the writ of certiorari.

The trial judge was direct in rejecting Illinois law. After extended argument, the court simply chose to disregard the statute and apply general rules of fraud:

> "The Court: No, I would rather not see it because I have said again and again the laws of Illinois are not to be brought in to aid either side in this.
>
> Mr. Cook: This eliminates the third affirmative defense. [The defense of misrepresentation].
>
> The Court: This defense number 3 I drafted was totally without concern for the insurance law of Illinois.
>
> Mr. Cook: But it has to be related to their affirmative defense.
>
> "The Court: It is simply an old equitable defense that grows out of the law of contracts, fraud in the inception. It will void any contract. Any law of Illinois notwithstanding, it will always void a contract. (A. 252; Appendix D)

The Court of Appeals was indirect but just as effectively rejected Illinois law. It simply stated that the "plaintiff makes certain additional contentions asserting error in the giving of an instruction to which it objected * * *", and that "we have considered all of these contentions and find them lacking in merit in that none of the matters complained of reveal any error, on the record here involved, which would require reversal." (Op. 5-6).

The effect of the decision of both courts is, of course, identical. Plaintiff was deprived of a trial of the issues within long established rules of law. Plaintiff made extended objection to the action of the trial judge in permitting the defense and emphasized the seriousness of the ruling on this point (App. 250-256; Appendix D). Plaintiff was not making a mere tactical point for appeal but was bending every effort to prevent the trial judge from putting the issue as a matter of general contract law and from refusing to be bound by the requirement of the Illinois statute. The refusal to follow Illinois law was so irregular and such a deviation from accepted practice as to effectively destroy plaintiff's right to a jury trial, to the equal protection of the law, and to elemental due process.

Sec. 1652 of the Judicial Code, sometimes known as the "Rules of Decision Act" has had a long history. Section 1652 is a restatement of section 34 of the original Judiciary Act of 1789—broadening that section so as to make it applicable to "civil actions" and not merely to "trials at common law", (Sec. 34 of the Judiciary Act is stated in 28 U.S.C., sec. 725 (1940); now 28 U.S.C.A., sec. 1652; for full discussion see Moore's Federal Practice, 2nd ed., vol. 1A, sec. 0.302 [1] and 0.305 [1].

Such a ruling is a matter which should be of concern to this court. Section 766 of the Illinois Insurance Code is a remedial statute. Aldrich "Waiver (n)or Estoppel, 1964 Illinois Law Forum 342, at p. 344. In requiring that a claimed misrepresentation be in writing, the statute was obviously designed to protect the insured against the construction of fraud defenses after the loss occurred. This case involved an Illinois insurance policy, an Illinois loss, and an Illinois corporation. Section 1652 of the Judicial Code requires that Illinois law be applied. This court must recognize that it has allowed certiorari or

taken appeals in a variety of cases under Section 1652 where the lower courts have applied state law erroneously. (See Moore's Federal Practice, 2nd ed., vol. 1A, sec. 0.302 [3], 0.302 [4], 0.306.) Yet, here is a case in which the lower courts have refused to apply state law in the first instance—in direct contravention of the statute. If it is error to interpret wrongly, the error is indeed amplified by the refusal to apply the statutory requirement in the first instance.

The court here is not being asked to consider this case merely because a different interpretation than that adopted by the Court of Appeals is possible. Lawyers who try cases come soon to the recognition that they are advocates and that the interpretation of law by the courts and of facts by the juries may differ from their own. But that recognition is grounded on the realization that, on fundamental questions, lawyers and litigants can rely on the rule of law rather than the rule of men. That doctrine is basic to our jurisprudence and entitles the plaintiff, even in this entirely private litigation, to the protection of this court.

Let us put it another way. Every litigant in every Federal Court has the right to have his case heard in accordance with the substantive law of the state. The only exception is the exception in Section 1652, "where the Constitution or treaties of the United States or Acts of Congress, otherwise require". Yet, in this case, on an important and controlling issue, the jury was instructed to find according to general law and in denial of the statutory protection given to the insured. Such action was wrong and wrong, not on a question of interpretation but, on a question of basic right—the right of the litigant in a Federal Court to the same rule of law which would be applied in a state court.

The Court of Appeals has glossed over the issues so that the fabric of the law appears intact. Formally, there has been no invasion of the clear requirement of Section 1652, but in substance there has and this court is known as one which looks to the substance of what has taken place rather than to its form. In short, this case should be considered for what it is: an unequivocal holding by the Court of Appeals that it will not apply Illinois statute law where the trial judge has determined that general, but contrary, rules of decisional law should be applied. A rule of law so stated should not be allowed to stand.

This ruling of the trial judge was not mere harmless error but went to the heart of plaintiff's case. Plaintiff could prevail on every other aspect of the case yet be denied its relief because the jury was directed to consider whether there was misrepresentation in obtaining the insurance. Under the law of Illinois, that issue cannot be in the case unless the claimed misrepresentation be in writing. In the Federal Court, this plaintiff was given a different case and a different rule of law than it would have had in the state court and was denied the protection of Section 1652 of the Judicial Code and Section 766 of the Illinois Insurance Code.

The trial judge chose to follow an "old equitable defense that grows out of the law of contracts" (Appendix D) rather than the Illinois Insurance Code which was applicable to this insurance contract. He thereby took unto himself a power which he did not have. In the words of Mr. Justice Holmes, his was "an unconstitutional assumption" of power "which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black and White Taxicab & Transfer Company* v. *Brown and Yellow Taxicab & Transfer Company,* 276 U.S. 518, at 533, dissenting opinion, (1927). Ten years later, the

rule of the dissent became law in *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1937). In overruling the doctrine of *Swift* v. *Tyson,* 16 Pet. 1, this court expressly recognized the unconstitutionality of applying general law which differed from the law of the state:

> "Thus, the doctrine [of *Swift* v. *Tyson*] rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.
>
> "The discrimination resulting became in practice far reaching. This resulted in part from the broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment." (at p. 75)

The trial judge, in electing to follow general law has turned back beyond *Erie* v. *Tompkins,* beyond *Swift* v. *Tyson,* and beyond the Rules of Decision Act to some vague and transcendental body of law different from and superior to the statute law of Illinois. The Court of Appeals, in its decision, approved that election with no more reason, in either court, than an unexplained desire to apply a new and special rule of law to this litigation. Plaintiff is now in the position where its only available relief against this unconstitutional and arbitrary decision is in this court.

Rule 19 permits certiorari where a court of appeals is in conflict with the decisions of other courts of appeals, or has decided a federal question in a way in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such a departure by the lower court as to call for an exercise of this court's power of supervision. Tested against Rule 19, the action of the trial judge in adopting general law over applicable statute law and of

the Court of Appeals in approving that act is so unusual, so contrary to the decisions of this court, and so neglectful of the mandatory application of state law in federal courts, as to justify the request of petitioner for the writ of certiorari.

Respectfully submitted,

JOHN P. MADIGAN,
Attorney for Petitioner.

JOHN A. COOK,
SAMUEL M. LANOFF,
MORGAN, HALLIGAN, LANOFF & COOK,
33 South Clark Street,
Chicago, Illinois 60603,
Of Counsel.

APPENDIX A

Opinion of the Court of Appeals

July 18, 1967

Before SCHNACKENBERG, CASTLE and FAIRCHILD, *Circuit Judges.*

CASTLE, *Circuit Judge.* The plaintiff-appellant, Young-Peterson Construction, Inc., brought this diversity action in the District Court against The Potomac Insurance Company of the District of Columbia, defendant-appellee, seeking to recover the value of four truck tractors and dump-type trailers under the "theft" clause of an insurance policy deefndant issued to the plaintiff. The cause was tried to a jury which returned a verdict for the defendant upon which the court entered judgment. The plaintiff appealed and contends the court committed reversible error in its denial of plaintiff's motion for a directed verdict and its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

The main contested issue precipitated by plaintiff's appeal, and about which its principal contention centers, is whether there is any evidence to support a conclusion by the jury that the taking involved was in the exercise of a good faith claim of right.

The insurance policy issued by the defendant listed the motor vehicle equipment here involved and contained a clause insuring against loss or damage "caused by theft, larceny, robbery or pilferage". Plaintiff contends that the four truck tractors and trailers in question were taken by Robert Holtman on or about April 24, 1959, from a service-station storage yard at Homewood, Illinois, transported to Phoenix, Arizona, and there sold by Holtman, under circumstances constituting a theft rather than a taking in a good faith exercise of a claim of right.

Plaintiff, an Illinois corporation, was organized by J. Bernard Mullen, Jr. and Mark Willing, Jr. in March of 1958 to perform a highway construction sub-contract. Allen Young was employed as the president of the corporation. He was not, however, a stockholder, nor did he ever make any capital contribution to the corporation. The sub-contract was completed in October, 1958, and although by its terms Young's written employment contract as president and general manager of the plaintiff corporation then expired, he continued to assist in its activities in connection with finishing two related hauling jobs the corporation performed and thereafter went to Arizona in an effort to locate work on which the plaintiff's equipment could be utilized. The plaintiff had no active vice-president, and a president to succeed Young was not named until after the events which are here pertinent.

The five truck tractors and trailers which the plaintiff had purchased to perform the highway construction sub-contract were stored in December 1958 on a farm at McHenry, Illinois. In April 1959 they were moved to the service-station lot at Homewood.

The testimony relevant to the circumstances leading to and surrounding Holtman's removal of four of the truck tractors and their trailers from the Homewood premises presents conflicts. But the resolution of these conflicts and the credibility questions incident thereto was peculiarly within the province of the jury. The scope of our review, insofar as the sufficiency of the evidence is concerned, is here limited to a determination of whether the evidence, and all reasonable inferences that may be drawn therefrom, considered in the light most favorable to the defendant, supports the verdict of the jury.

The plaintiff contends that the defendant's defense that Holtman's taking of the motor vehicle equipment was in the exercise of a good faith claim of right, and therefore not within the scope of the coverage afforded by the policy, is defective in two respects. First, that the claim of right defense is available only where the taker is a person having a pre-existing close relationship

of use and ownership to the property taken which precedes that of the person from whom the property was taken. And, second, that in the instant case the essential element that the taker be in the exercise of good faith in his claim of right is lacking—that the record negates good faith on the part of Holtman.

It is conceded that Holtman never had any relationship of use or ownership of any of the vehicles, or interest therein, which preceded that of the plaintiff. It is on the basis of the absence of any such factor that plaintiff makes its first contention that the claim of right defense is unavailable to the defendant. Plaintiff cites nine cases[1] which have been concerned with the development and application of the claim of right doctrine as a defense to the liability of an insurer under the "loss by theft" coverage of its policy. Plaintiff contends that these cases authorize the claim of right defense only where the taker, in addition to being in good faith, was taking a vehicle as to which he had a prior close relationship of use and ownership. While these cases are illustrative of factual situations where such a factor was present, we perceive nothing in the rationale upon which these decisions are based which makes the element of such a prior relationship to or ownership of the property taken a *sine qua non* to the availability of the claim of right defense to the insurer of the property. In our opinion the defense is available where the taking is by any person acting under an honest belief that he is entitled to possession of the property. Insurance Law and Practice, Appleman, §3211, p. 356.

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[1] *Laporte Motor Company* v. *Firemen's Ins. Co., of Newark, N.J.*, 209 Wisc. 397, 245 N.W. 105; *Durback* v. *Fidelity and Guarantee Co.*, 85 Atl. 2d 315, 17 N.J. Sup. 160; *Bowling* v. *Hamblen County Motor Co.*, 16 Tenn. App. 52, 66 S.W. 2d 229; *Bigus* v. *Pacific Coast Casualty Co.*, 129 S.W. 982, 145 Mo. App. 170; *Rush* v. *Boston Insurance Co.*, 150 N.Y. 457, 88 Misc. 48; *State Assurance Underwriters of Providence Fire Ins. Co.* v. *Miller*, 58 So. 2d 532; *South Carolina Ins. Co.* v. *Jackson*, 117 S.E. 2d 878; *Talasek* v. *Travelers Fire Ins. Co.*, 242 F. 2d 748; *Reece* v. *Motors Ins. Corp.*, 116 F. Supp. 394.

We turn to consideration of whether, viewing the record most favorably to the defendant, there is any evidence which would warrant a conclusion by the jury that Holtman acted in good faith and under color of right in his taking of the four truck tractors and their trailers. In this connection there is evidence that before Holtman removed the vehicles from the Homewood service-station lot, Young, who had possession of the title documents to the vehicles, had, over his signature as president of the corporation, executed assignments of the titles from plaintiff to Holtman as security for loans and advances made by Holtman, and had delivered the title certificates and the keys to the vehicles to Holtman. Prior to removing the vehicles, Holtman had conversations with Mullen, and with an attorney for the plaintiff, in which he informed them he had title to the vehicles and had come to get them. Neither questioned the authority of Young to act for the plaintiff but advised Holtman that Young couldn't have given him title to the vehicles because they belonged to a bank which had liens on them. The title papers disclosed no liens and Holtman proceeded to remove the vehicles after first soliciting and obtaining the presence of a local police officer to stand by in event of any trouble. The vehicles were openly transported in caravan to Arizona where Holtman resided.

The record discloses that Young, while attempting to secure construction work in Arizona on which the plaintiff's motorized equipment could be put to use, contacted Holtman at the latter's residence in Phoenix. Young had been told that Holtman also had been a sub-contractor on the Illinois project. Young subsequently made representations to Holtman to the effect that the plaintiff was about to become the prime contractor in connection with a project for the construction of housing for the elderly at Phoenix; that plaintiff would do the site-leveling, dirt moving, sewer and road work itself, but would sub-let the balance of the work. There is testimony that the loans and other advances made by Holtman at Young's request, and for which the assignments of title

to the truck tractors and trailers were given as security, approximated $40,000.00. A substantial portion of the money advanced by Holtman was, according to his understanding of Young's representations, a loan to plaintiff to be used for a payment in connection with the housing development project on which plaintiff was to be the prime contractor, in return for which loan Holtman was to receive a 25% interest in the plaintiff and in addition was to be a sub-contractor on the dirt moving involved.

It is not necessary to an application of the claim of right defense that the evidence establish that the taker had a valid right to take the property. Consequently, we are not here concerned with what actual and ultimate legal rights or obligations were created between plaintiff and Holtman by the transactions involved. Nor need we consider and determine the question of Young's actual authority to bind the plaintiff corporation or whether all of the advances made by Holtman may have resulted in the creation of obligations within the scope of that authority.

We are, however, of the opinion that there is evidence from which the jury could have reasonably concluded that Holtman's taking of the truck tractors and trailers was in a good faith exercise of a claim of right based on the assignments of title which had been given to him. The taking was therefore not within the "loss by theft" coverage afforded by the policy issued by the defendant.

In connection with the denial of its motion for a new trial the plaintiff makes certain additional contentions asserting error in the giving of an instruction to which it objected, error arising from comment made by the trial judge in the course of the trial, and error in the court's permitting an amendment to defendant's answer on the first day of trial setting forth additional affirmative defenses. Plaintiff also complains of the conduct of the defendant in interviewing plaintiff's handwriting expert in the absence of plaintiff's counsel after a previously scheduled discovery deposition of the witness had been

continued. The taking of the deposition was subsequently abandoned. We have considered all of these contentions and find them lacking in merit in that none of the matters complained of reveal any error, on the record here involved, which would require reversal. No useful purpose would be served by extending this opinion to discuss them. Suffice it to observe that the trial court's refusal to grant a new trial was not an abuse of discretion. *Hardware Mutual Casualty Company* v. *Chapman*, 7 Cir., 272 F. 2d 614, 617.

The judgment order appealed from is affirmed.

AFFIRMED.

APPENDIX B

Judgment Order of the Court of Appeals Entered July 18, 1967

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

Order of the Court of Appeals on Petition for Rehearing Entered August 28, 1967

It Is Ordered by the Court that the petition for a rehearing of this cause filed by the plaintiff-appellant herein be, and the same is hereby DENIED.

APPENDIX C

Testimony of David Peck

[By Mr. Williams, attorney for Potomac Insurance Co.]

"Q. Had you known from any source whatsoever, Mr. Mullen or otherwise, on April 19, 1959 that the titles to these four trucks were in the possession of a third person not an employee, not an officer in the company, along with the keys back of these titles the, what appeared at least to be, the signature of the President of the company endorsing them over to someone else existed and that the titles indicated no liens on the face of the titles, would you have issued this insurance?" (App. 174-5).

After objection and ruling by the court, the court restated the question as follows:

"The Court: Do you understand the question? The question is, suppose Mr. Mullen himself had told you that these trucks which you had insured which belonged to the corporation, are trucks, the keys of which have been given over by the President to a third party and the titles of which have been forged or misrepresentations have been based on them, 'but still I want you to put insurance on them', would you have put insurance on them?"

The Witness: If he—

The Court: If he had told you that.

The Witness: That the titles are forged?

The Court: Yes.

The Witness: No, I don't think I would have.

The Court: Of course you wouldn't.

The Witness: I didn't quite get—

The Court: Even for Mr. Mullen?

The Witness: No. I didn't get the forgery aspect. That is what I was wondering about.

By Mr. Williams:

Q. Well regardless of whether you knew they were forged or not, as long as you knew that they were in dispute—

Mr. Cook: I again object. This is all argument.

Mr. Williams: All right.

Mr. Cook: This witness—

"The Court: He may ask the question: 'Even if Mr. Mullen said not that they were forged but that the titles were in dispute, would you have placed insurance on them for him, if he told you—'

The Witness: I would have had to discuss this, I think, with the insurance company or with other parties.

The Court: You wouldn't have bound the company without first discussing it with the company, isn't that correct?

The Witness: I don't think so, no.

The Court: This is the point which he seeks to make. It is hypothetical. He has a right—

The Witness: No, I think I would have to go along—if I knew that this was an illegal procedure, I don't think in fairness to the insurance company—I would have to discuss it further.

[By Mr. Williams]:

Q. All right. One more question.

You have been a long time friend of Mr. Mullen, have you not, socially and otherwise, for twenty years?

A. Correct.

Mr. Williams: That is all." (App. 176-177)

APPENDIX D

Objection to Instruction on Third Affirmative Defense Based on Section 766 of the Insurance Code

Mr. Cook: That is correct. We understand that. We also understand that the statutory law, which has now been given to us, says that for the insurance company to stand on that proposition, then it must assert that it has a declaration of that condition.

There is no such declaration in this case. It has not been proved from the witness stand. There is no documentation on it. It is not in the original policy. There is nothing that could be said to bring it within this cloudy framework that they have been arguing during the course of this trial that somehow Mr. Mullen should have advised the company that at the time he called Dave Peck the insurance title supposedly had been assigned by Young and supposedly the keys had been delivered to Holtman.

That can only be an effective and affirmative and positive defense on one condition, that that condition of Section 766 be applied.

Now, I would like to read, if I may—now, this is the insurance code. I would like to hand it up to the Court, if the Court please—

The Court: No, I would rather not see it because I have said again and again the laws of Illinois are not to be brought in to aid either side in this.

Mr. Cook: This eliminates the third affirmative defense.

The Court: This defense No. 3 I drafted was totally without concern for the insurance law of Illinois.

Mr. Cook: But it has to be related to their affirmative defense.

The Court: It is simply an old equitable defense that grows out of the law of contracts, fraud in the inception. It will void any contract. Any law of Illinois notwithstanding, it will always void a contract. If there was, I don't see where there is too much room for them to argue it, that there was.

Mr. Cook: I think it is grossly unfair to this plaintiff—

The Court: But there has been some evidence of fraud. There is some testimony from a witness whom you produced to the effect that had he known certain things, if they could have been known by the insurer and transmitted to him, he wouldn't have written the binder.

The Court: Now, the job for you gentlemen to do is to argue the facts.

Mr. Cook: But the facts within the law, if the Court please—

The Court: Tell the jury that the plaintiff didn't know these things, that these things weren't true anyway, that the plaintiff didn't know them and, therefore, there was no fraud in the inception. He will be yelling that there will be fraud. This is the way to do it.

Mr. Cook: Section 766 is applicable to insurance contracts. They are governed by statute. There are two volumes of the Illinois Code which relate to them.

We understand what the rules are in relation to fraud, but I think counsel indicated in his statement in which he described this section that he was relying on that it had come in because of the abuse of this defense, which the Court is now permitting to go to the jury, in other

words, a nebulous cloud that somehow the insured is involved in.

It says that these insurance companies when they are writing insurance, if they choose to be protected by a fraud in the declaration, then they shall state that in the declaration. That is the purpose of this statute. It overrides the common law in this kind of a special contract which is fully and completely regulated by our statutes.

I think that to permit that to go to the jury in this case would be an erroneous application of a general doctrine of contract law, which has now been overridden by statute as it relates to the specific type of contract we are dealing with. I can also cite Fletcher Corporations, which deals with the question of the fraudulent president, if this was the case, in which it says again this does not bind the corporation, this knowledge is not imputed to the corporation. There should be an instruction on that. I refer the Court, if I may, to Section 818, Section 819 and Section 820 of Fletcher in which there is a host of cases dealing with this question.

Basically and fully, our proposition, our case, on question of the fraud in the declarations, if there was such, and in this argument, must be controlled by this statutory scheme. We have no right to go beyond it. We are bound by the law in this courtroom.

The Court: Counsel has made his position excellently well understood.

Mr. Cook: Forgive me for making it vehemently, if the Court please, but I think it is an area in which damage will be done to the plaintiff in this case and it is an area which—

The Court: I differ with counsel. This is an area in which counsel can gain great strength on his case by the way he handles his argument. I assure counsel for both sides, even though I limit the arguments in time, that I shall consider the loser the one who fails to utilize the genius of arguing of his case to the jury and not the one who thinks that he has not gotten the instructions slanted his way. I am going to go right down the middle on these instructions and the fewer I give the better.

Let's make it a simple law case. You know, this is the kind of a case which should never be tried with a jury anyway. You should have tried it before me. However, you have it before a jury and I am not going to give them a whole lot of it—I am not going to send them through a four-year course in law or a three-year course in law in 20 minutes. It can't be done. Their instructions are just going to have to be the barest, simplest instructions and you will have to take it from there. This is the tragedy of the use of the system of instructing a jury as to the law in a case that should be before chancery and would have been except for our constitutional provision which makes it triable before a jury.

I feel sorry for the jury if I have to give them all of these instructions that have been proposed. I would do no more than confuse them and place both parties at the jeopardy of a confused jury. This jury has a basic understanding of simple principles about law and there is no reason why those simple principles, with the splendid oratory of counsel for both sides, can't be so clearly brought out in the minds of the jury that they will be able to come down with what is in fact the fair and honest and best decision in the case. When I began looking at those last night and studying them again and again going

over them, I recognized that, in the first place, that more in any recent case that there had been a seeking of importuning by both sides to get the instructions quite slanted in either directions, primarily because the theories of the case were somewhat difficult to grasp from the very outset and it began to develop, crystallize to the point where they were understood by counsel and the Court as the case progressed; but I can't help you with these instructions, I have to leave you out here, both sides out here, on these little limbs yourselves.

I am going to give simple instructions to the jury, basic, simple instructions, and allow you to carry on. The rest of it can be in the form of argument. We will be ready to proceed, gentlemen.

Mr. Cook: I have tendered this additional instruction in view of the Court's ruling, where it feels a fraud instruction should be given, in the inception of a policy, and I have given counsel a copy. This sets out the statutory section and states that the defendant has the burden of proving these kind of elements.

The Court: It may be tendered and the record will show it has been refused. (A. 250-255; R. 855-865)].

SUPREME COURT, U. S.

FILED

JAN 10 1968

JOHN F. DAVIS, CLERK

No. 907

In the

Supreme Court of the United States

OCTOBER TERM, 1967

YOUNG-PETERSON CONSTRUCTION, INC.,
an Illinois Corporation,

Petitioner,

vs.

THE POTOMAC INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, a Corporation,

Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN C. BARTLER
McKENNA, STORER, ROWE,
WHITE & HASKELL
135 South LaSalle Street
Chicago, Illinois 60603
Attorney for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

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RULE CITED

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The Potomac Insurance Company of the District of Columbia, defendant in this cause, respectfully states that the Petition of Young-Peterson Construction, Inc., does not demonstrate any of the grounds for Certiorari as set out in Rule 19 of the Rules of this Court and therefore prays that this Court not issue a Writ of

Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on July 18, 1967.

QUESTION PRESENTED

Was the action of the United States Court of Appeals for the Seventh Circuit, in affirming the District Court's holding, and in denying a Petition for Rehearing by holding Ill. Rev. Stat. ch. 73, § 766 (1957) inapplicable to a verbal binder for insurance such action which:

> ". . . has so far departed from the accepted and unusual course of judicial proceeding, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." U.S. Sup. Ct. Rule 19b.

STATUTE INVOLVED

Section 766 of the Illinois Insurance Code provides:

> "No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty, or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefore, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. This section shall not apply to marine or transportation insurance." (Ill. Rev. Stat. ch 73, § 766 (1957))

STATEMENT OF THE CASE

The Plaintiff, Young-Peterson Construction, Inc., requested that Mr. David B. Peck, an insurance agent with Lamb, Little & Company, secure only comprehensive, fire and theft coverages on certain trucks which allegedly belonged to the corporation. (A. 172)

Prior to April 24, 1959, the date upon which the vehicles were allegedly stolen, Mr. Peck, a long-time friend of Mr. Mullen, had had a conversation with Mr. Mullen, one of the officers of Young-Peterson, on the subject of certain insurance for the trucks. (A. 164) A written notice of binder was sent to the insurance company, but there was no official binder to Young-Peterson per se. (A. 164) Mr. Peck orally agreed to bind comprehensive, fire and theft coverage. No written binder or policy was ever issued by the Defendant or any other person to Young-Peterson Construction, Inc.

Although no objection was made at the time of filing the amended answer and the affirmative defenses, the plaintiff later objected to the affirmative defense of misrepresentation on the grounds that Ill. Rev. Stat. ch 73, § 766 barred a policy defense based upon misrepresentation unless the misrepresentation was in writing.

It was the position of the defendant in the trial court and in its brief to the Court of Appeals, and its brief filed in opposition to plaintiff's Petition for Rehearing in the Court of Appeals, that the statute upon which the plaintiff relies here, by its terms, only deals with written binders or policies of insurance. Since in this case there was no written binder or policy, the statute is inapplicable and both the District Court and the Court of Appeals were correct in so ruling.

Although the plaintiff is correct in stating that the judgment of the Court of Appeals against the plaintiff was based upon an opinion which dismissed this point, among others, by simply stating, at the close that:

> "We have considered all of these contentions and find them lacking in merit. . . ."

it should also be noted that plaintiff filed a nine (9) page Petition for Rehearing in the Court of Appeals which raised only the issue now raised in its Petition for Writ of Certiorari. Thereafter, the Court of Appeals also denied plaintiff's Petition for Rehearing.

The District Court and the Court of Appeals did not without reason refuse to apply Illinois law as plaintiff now suggests. Those courts merely held the Illinois statute inapplicable to this case and such action does not indicate as the plaintiff contends, that the Court of Appeals:

> ". . . has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

ARGUMENT

It has been the defendant's position, in the trial court and in the Court of Appeals, that the Ill. Rev. Stat. ch 73 § 766, urged by plaintiff as barring the defendant's affirmative defenses of misrepresentation, applies only to written policies, endorsements, riders, applications and in this case binders. Plaintiff attempts to avoid this issue completely by making the offhand contention, that a written binder had issued. It asserts that unless the misrepresentation relied upon by the insurer is in writing, a defense on the misrepresentation is barred by the statute. In spite of this position, it is curious that plaintiff finds it necessary to assert that a written binder had issued. (See Pages 3 and 5 of plaintiff's Petition for Writ of Certiorari) These allegations are made in spite of the testimony of Mr. David Peck, a long time friend of Mr. Mullen. (A. 177) Mr. Peck, an officer of Lamb, Little & Company, was called by the plaintiff, and under the questioning of plaintiff's counsel testified as follows on direct examination:

> "Prior to April 24th, I had many conversations with Mr. Mullen relative to insurance on the vehicles. In that preceding week I had a conversation with Mr. Mullen on the subject. *A written notice of binder was sent to the insurance company. There was no official binder to Young-Peterson Company, per se.*" (A. 164) (emphasis supplied)

No written binder had ever been issued by anyone. The trial judge, Judge Parsons, recognized that no written binder had been issued and further, that since the binder was oral, Ill. Rev. Stat. ch 73, § 766 did not apply. This is illustrated by the following:

"Mr. Cook . . . Section 766 of the Insurance Code as adopted in 1937 provides:

> 'No representation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance or breach of a condition of such policy shall defeat or void the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor of which a copy is attached to or endorsed on the policy or made a part thereof.
>
> 'No such misrepresentation or false warranty shall defeat or void the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company.'

"Now, in the evidence in this case there is no evidence of any declaration which is an essential condition precedent to the assertion of this defense.

"The Court: Well, of course, this policy was handled by an oral application and. . . ." (A. 250, 251)

A reading of the Ill. Rev. Stat. ch 73, § 766 illustrates that it was meant to apply only to written policies, endorsements, riders or applications. The obvious intent of the statute is to place upon the insurer, when it issues a written policy, the burden of including all representations or warranties upon which it wishes to rely. The insurer can protect itself by including all representations and warranties in the written contract. In the case of an oral agreement, it is not only impossible to attach a w ten document to an oral binder, as would be required by the statute, but the extension of the statute to an oral binder would leave the insurer without means to defend against any misrepresentations by the insured.

In cases of fraud, where an insured had orally bound coverage, under the plaintiff's theory, the insurer would always be defenseless against fraud and would have no recourse whatsoever under the law. This is not the law and should not be the law.

It is respectfully submitted that the District Court and the Court of Appeals properly rejected plaintiff's contention that Ill. Rev. Stat. ch 73, § 766 barred the defense of misrepresentation in this case.

The District Court and the Court of Appeals did not arbitrarily refuse to apply Illinois law to the case at bar, but they correctly refused to apply a statute which was not applicable to the facts in question.

CONCLUSION

It is submitted that the contentions raised in plaintiff's Petition, were fairly considered by both the District Court and the Court of Appeals and that those courts denied such contentions not without reason, but because the statute cited was inapplicable. The action of the trial judge and the action of the Court of Appeals in approving that action was not so unusual or contrary to the decisions of this court and so neglectful of the mandatory applications of state law in Federal Courts so as to justify petitioner's request for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

It is submitted that the request of petitioner for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN C. BARTLER
McKENNA, STORER, ROWE,
WHITE & HASKELL
135 South LaSalle Street
Chicago, Illinois 60603
Dearborn 2-0913
Attorneys for Respondent.